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No.

IN THE

# Supreme Court of The United States

OCTOBER TERM, 1989

UNITED STATES CAN COMPANY,
a Georgia Corporation, CONTINENTAL
BEVERAGE PACKAGING, INC.,
a Delaware Corporation,

*Petitioners,*

*v.*

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS, *et al.,*

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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## QUESTION PRESENTED

Does Section 301 of the Labor-Management Relations Act preempt state-law, non-substantive remedies—even if characterized as "nonnegotiable"—invoked by a party to a collective bargaining agreement to prevent anticipated violations of the contract?

## STATEMENT REQUIRED BY RULE 28.1

United States Can Company is a wholly owned subsidiary of Inter-American Packaging, Inc., a privately held corporation, and is Inter-American Packaging, Inc.'s only subsidiary. United States Can Company has no subsidiary companies. Inter-American Packaging, Inc. and United States Can Company do not have any affiliate corporations. G.P. Acquisition Company, Inc. and its wholly-owned subsidiary CCC Series 200, Inc., formerly affiliates of Inter-American Packaging, no longer exist as corporate entities, having been merged into United States Can Company.

Continental Beverage Packaging, Inc., the company formerly known as Continental Can Company, USA, Inc., is a wholly-owned subsidiary of Continental Can Company, Inc. which, in turn, is a wholly-owned subsidiary of Kiewit Continental Inc. Kiewit Continental Inc. is a wholly-owned subsidiary of Kiewit Holdings Group, Inc. which, in turn, is a wholly-owned subsidiary of Kiewit U.S. Co. Kiewit U.S. Co. is a wholly-owned subsidiary of Peter Kiewit and Sons', Inc. Other United States affiliates (except for under 10% affiliates) are CWC Leasing, Inc., Continental Can Leasing, Inc. and Unicon Producing Company. In addition, Kiewit Continental Inc. is a shareholder or partner in numerous foreign companies which are engaged in the packaging business outside the United States.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| STATEMENT REQUIRED BY RULE 28.1 | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | iv |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATUTORY PROVISIONS | 2 |
| STATEMENT OF THE CASE | 3 |
| REASONS FOR GRANTING THE WRIT | 7 |
| I. The Wisconsin Supreme Court's Decision Conflicts With Prior Decisions Of This Court And Pertinent Decisions Of The Federal Courts of Appeals | 8 |
| II. Prompt Resolution Of This Conflict Is A Matter Of Great National Importance | 13 |
| CONCLUSION | 16 |
| APPENDIX | |
| Decision of Wisconsin Supreme Court | 1A |
| Certification of the Wisconsin Court of Appeals | 33A |
| Decision of Circuit Court of Racine County | 34A |

## TABLE OF AUTHORITIES

Page

CASES:

*Air Line Pilots Association* v. *UAL Corp.*, 874 F.2d 439 (7th Cir. 1989) ..... 9, 10

*A/S Kreditt Finans* v. *Cia Venetico De Navegacion*, 560 F. Supp. 705 (E.D. Pa. 1983), *aff'd*, 729 F.2d 1446 (3d Cir. 1984) ..... 14

*Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985) . *passim*

*Baldracchi* v. *Pratt & Whitney Aircraft Division*, 814 F.2d 102 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2819 (1988) ..... 9, 10

*Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983) ..... 2

*Blumenthal* v. *Blumenthal*, 303 Mass. 275, 21 N.E.2d 244 (1939) ..... 14

*Brown* v. *Keystone Consolidated Industries, Inc.*, 680 F. Supp. 1212 (N.D. Ill. 1988) ..... 13

*Caterpillar* v. *Williams*, 482 U.S. 386 (1987) .... 5, 6, 8, 9, 13

*Clark* v. *Rossow*, 134 Ariz. 490, 657 P.2d 903 (Ct. App. 1982) ..... 14

*Deford* v. *Soo Line R.R.*, 867 F.2d 1080 (8th Cir.), *cert. denied*, 109 S. Ct. 3265 (1989) ..... 6, 7, 11, 12, 13

*Electrical Workers* v. *Hechler*, 481 U.S. 851 (1987) . 9, 11

*Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27 (1987) ..... 8

*Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) ..... 9

*Gibson* v. *AT&T Technologies, Inc.*, 782 F.2d 686 (7th Cir.), *cert. denied*, 477 U.S. 905 (1986) .... 13

*Howard Johnson Co.* v. *Detroit Local Joint Executive Board, Hotel and Restaurant Employees*, 417 U.S. 249 (1974) ..... 7, 8

*International Association of Machinists & Aerospace Workers* v. *United States Can Co.*, 150 Wis. 2d 479, 441 N.W.2d 710 (1989) ..... *passim*

Page

*Jackson* v. *Liquid Carbonic Corp.*, 863 F. 2d 111 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 3158 (1989) . . 13

*Lever Bros. Co.* v. *International Chemical Workers Union*, 554 F.2d 115 (4th Cir. 1976) . . . . . 8

*Lingle* v. *Norge Division of Magic Chef, Inc.*, 108 S. Ct. 1877 (1988) . . . . . 9, 10, 11, 12, 13

*Local 1266, International Association of Machinists* v. *Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981) . 8

*Lueck* v. *Aetna Life Insurance Co.*, 116 Wis. 2d 559, 342 N.W.2d 699 (1984), *rev'd*, 471 U.S. 202 (1985) . . . . . 10

*Milne Employees Association* v. *Sun Carriers*, 714 F. Supp. 1028 (N.D. Cal. 1989) . . . . . 13

*Newberry* v. *Pacific Racing Association*, 854 F.2d 1142 (9th Cir. 1988) . . . . . 13

*Railway Labor Executives Association* v. *Pittsburgh & Lake Erie R.R.*, 858 F.2d 936 (3d Cir. 1988) . 11

*San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959) . . . . . 8

*Serrano* v. *Jones & Laughlin Steel Co., LTV Corp.*, 790 F.2d 1279 (6th Cir. 1986) . . . . . 8

*Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962) . . 8

*Terwilliger* v. *Greyhound Lines, Inc.*, 1989 WL 88968 (6th Cir. 1989) . . . . . 12

*United Food and Commercial Workers, Local 626* v. *Kroger Co.*, 778 F.2d 1171 (6th Cir. 1985), *cert. denied*, 479 U.S. 815 (1986) . . . . . 8

*United Paperworkers International Union* v. *Misco*, 484 U.S. 29 (1987) . . . . . 14

*United States* v. *Tabor Court Realty Corp.* 803 F.2d 1288, 1297 (3d Cir. 1986), *cert. denied sub nom., McClellan Realty Co.* v. *United States*, 483 U.S. 1005 (1987) . . . . . 14

| | Page |
|---|---|
| *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) | 14 |
| *Wells* v. *General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989) | 13 |
| STATUTES: | |
| 28 U.S.C. § 1257(a) | 2 |
| 28 U.S.C. § 2101(c) | 2 |
| 29 U.S.C. § 157 | 4 |
| 29 U.S.C. § 158 | 4 |
| 29 U.S.C. § 160 | 4 |
| 29 U.S.C. § 185(a) | *passim* |
| Uniform Fraudulent Conveyance Act, Wis. Stat. § 242 *et seq.* (1985-86), *repealed and recreated,* Uniform Fraudulent Transfer Act, Wis. Stat. § 242 *et seq.* (1987-88) | *passim* |
| OTHER AUTHORITIES: | |
| *Leveraged Buyout Market Survey,* Mergers & Acquisitions (May/June 1989) | 14 |

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---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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## OPINIONS BELOW

This petition seeks review of the majority (4-3) opinion and judgment of the Supreme Court of Wisconsin which, with the dissenting opinion, are reported as *International Association of Machinists & Aerospace Workers* v. *United States Can Co.*, 150 Wis. 2d 479, 441 N.W.2d 710 (1989), and are reproduced in the appendix to the petition (1A-32A). The certification of importance of the Wisconsin Court of Appeals is unreported and is reproduced in the appendix (33A-39A). The opinion of the Circuit Court for Racine County is unreported and is reproduced in the appendix (40A-44A).

## JURISDICTION

The decision of the Wisconsin Supreme Court issued on June 27, 1989. This petition is therefore timely under 28 U.S.C. § 2101(c). Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decision below is final in that it finally disposed of the federal preemption issue. *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 497-98 n.5 (1983).

## STATUTORY PROVISIONS

Section 301(a) of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The pertinent provisions of the Wisconsin Fraudulent Conveyance Act (Wis. Stat. § 242 *et seq.* (1985-86), *repealed and recreated by* Uniform Fraudulent Transfer Act, Wis. Stat. § 242 *et seq.* (1987-88) are:

> **242.01(3)** "Creditor" is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.
>
> **242.04 Contract producing insolvency, fraudulent.** Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.
>
> **242.05 Other specifications of legal fraud.** Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after

the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent.

**242.07 Fraud in fact.** Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, is fraudulent as to both present and future creditors.

## STATEMENT OF THE CASE

As respondents IAM and its local unions ("IAM") argued below,[1] this case presents issues of "far-reaching significance in the fields of labor law [here, LMRA Section 301] and fraudulent conveyance law" (IAM Br. at 2). Specifically, it raises the question whether state laws—which provide remedies (characterized as "nonnegotiable") but no *substantive* rights—may be invoked by a party to a collective bargaining agreement to block a leveraged buyout because it is anticipated that the transaction will fraudulently violate rights grounded in the labor agreement. The Wisconsin Supreme Court's resolution of this question conflicts with controlling decisions of this Court and pertinent decisions of the First, Sixth, Seventh and Eighth Circuits.

Respondent IAM filed suit on June 3, 1987 in the Wisconsin Circuit Court, Racine County. The complaint alleged that U.S. Can in the spring of 1987 agreed to buy the general packaging division of Continental in a leveraged buyout which would be accomplished by pledging the assets of the packaging division to

[1]The plaintiffs below and respondents in this Court are the International Association of Machinists & Aerospace Workers, IAM Locals 437 and 710, and IAM Districts 10 and 172. Suit was brought by these labor unions on behalf of themselves and as authorized representatives of all IAM employees of United States Can Company, Continental Can Company, CCC Series 200, Inc., Inter-American Packaging, Inc. and GP Acquisition Company, Inc.

various lenders and unreasonably encumbering these assets with sixty-five million dollars of debt. Declining to pursue available federal labor law remedies (*see infra* note 3), the IAM instead claimed that it and its members located at facilities in both Wisconsin and Illinois were "creditors" of U.S. Can and Continental "under the collective bargaining agreements" for purposes of section 242.01(3) of the Wisconsin fraudulent conveyance statute "in the approximate amount of $19,950,000." *See* R. 2, ¶ 3; App. 14A-16A. The complaint alleges that this:

> indebtedness is comprised of matured as well as unmatured claims over the life of plaintiffs' current collective bargaining agreement for wages, vacation pay, sick leave pay, life, health and accident insurance, pension contributions, and other employee benefits, as well as claims asserted in various grievance and arbitration proceedings, *all owed to the employees pursuant to the collective bargaining agreement.*

*See* R. 2, ¶ 3 (emphasis added). Additional indebtedness directly to the IAM was claimed pursuant to the dues check-off and other provisions of the agreement. *Id.* ¶ 4. As relief, the complaint requested an order declaring the transaction "fraudulent" and enjoining its completion. *Id.* at p. 27. The companies interposed various defenses, including that the IAM's claims were preempted by LMRA Section 301 and Sections 7, 8 and 10 of the National Labor Relations Act, 29 U.S.C. §§ 157-58 and 160. R. 3, ¶ 30; R. 6, ¶ 30.

On July 24, 1987 the Circuit Court of Racine County granted the joint motion of the companies "on the pleadings" to dismiss the complaint. The trial court reasoned that the IAM's "undeniable basis for being in court" is the collective bargaining agreement and that whatever rights the unions had as "creditors" derived completely from that agreement. Therefore, any state-law claim brought on that "creditor" status must be pre-empted by LMRA Section 301. *See* App. 5A, 42A. Following this Court's decisions in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985),

and *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386 (1987), the trial court also rejected the IAM's contention that it was merely asserting "independent" rights under the Wisconsin fraudulent conveyance act. The IAM's characterization "does not change the nature of the animal. The animal is still protection of rights guaranteed by the collective bargaining agreement." *See* App. 43A.

The IAM appealed to the Wisconsin Court of Appeals and, because this "case presents a potential conflict between federal labor law and state policy as expressed by the [Wisconsin] legislature" and "[t]he decision will have statewide, as well as nationwide, impact on mergers and acquisitions," that court in turn certified the following question to the Wisconsin Supreme Court: "Whether an action under the Uniform Fraudulent Conveyance Act, ch. 242, Stats., is preempted by Sec. 301 of the Labor Management Relations Act when brought by a union and employees against an employer." *See* App. 2A, 35A, 39A.[2]

Four justices of the Wisconsin Supreme Court, notwithstanding their reversal in *Allis-Chalmers Corp.*, insisted that state-law remedies are available for violations of collective bargaining agreements and held that Section 301 did not preempt this action. The Wisconsin Court acknowledged this Court's directive in *Caterpillar*, 482 U.S. at 400, that "Section 301 governs claims founded directly on rights created by collective bargaining agreements, *and also* claims 'substantially dependent on analysis of a collective bargaining agreement.' " (emphasis added). *See* App. 10A. Nonetheless, it ruled that *Caterpillar* did not apply to this state law action to *enforce* the agreements here because substantial interpretation was not required. The Court held that Wisconsin's fraudulent conveyance remedies—although not "substantive" but

[2]The Wisconsin Supreme Court also took on certification a separate order which denied the IAM's request to set aside the original dismissal. Because it concluded that the complaint was improperly dismissed, the Supreme Court did not consider that separate order in rendering its decision. *See* App. 2A, n.1.

simply "remed[ies] to assist in the satisfaction of . . . substantive claim[s]"—were "nonnegotiable." Accordingly, such remedies could *never* be pre-empted because, the Court believed, such "remedial" rights "are significant ones in the panoply of most states' arsenals against those who would defraud creditors." *See* App. 14A-16A, 19A.

The Wisconsin Supreme Court also refused to hold the fraudulent conveyance claims pre-empted even though the IAM's "creditor status" undeniably had its "genesis" in the "employer-employee status, which is defined by one or more collective bargaining agreements." The Court believed that "whether that status arose as the result of obligations to them under the collective bargaining agreement is immaterial. It is the [creditor] status that counts, not its origin." *See* App. 4A, 14A, 21A. In this regard, the Wisconsin Court expressly rejected the majority opinion in *Deford* v. *Soo Line R.R.*, 867 F.2d 1080 (8th Cir.), *cert. denied*, 109 S. Ct. 3265 (1989), which had, less than five months before, held that an action to declare the transfer of assets pursuant to a leveraged buyout fraudulent under the Minnesota Uniform Fraudulent Transfer Act was pre-empted by the Railway Labor Act.

In their dissent, Justices Ceci, Callow and Steinmetz were "at a loss to understand how the majority could conclude [that the complaint was not preempted by Section 301]." *See* App. 23A. Fearing that "applying state law rules of contract interpretation" would needlessly complicate and disrupt the "negotiation and administration of collective bargaining agreements," the dissent emphasized that "the debts the unions are seeking to secure exist solely because of the collective bargaining agreement." *See* App. 23A-24A, 25A. Under *Caterpillar* and the Eighth Circuit's decision in *Deford*, the fraudulent conveyance claims could not be "separate" or independent because a determination of the IAM's claims, including "claims asserted in various grievance and arbitration proceedings," would "*undoubtedly* force the court to

construe the meaning and impact of the numerous provisions of the collective bargaining agreement in light of the provisions and definitions of the Uniform Fraudulent Conveyance Act." Thus, "the companies' liability ["not just damages"] under state law is decided by reference to the collective bargaining agreement." *See* App. 25A, 27A, 28A & n.1 (emphasis in original).

## REASONS FOR GRANTING THE WRIT

This case presents the question whether state-law claims which are purely remedial and provide no "substantive" rights may be invoked by a party to a collective-bargaining agreement to block a sale of a business in order to prevent an allegedly fraudulent violation of the agreement. The majority opinion of the Wisconsin Supreme Court is contrary to an entire line of decisions by this Court holding that Section 301 pre-empts state law claims seeking to enforce rights contained in a collective bargaining agreement. The Wisconsin Supreme Court also created a direct conflict with the decision of the United States Court of Appeals for the Eighth Circuit in *Deford*, as well as with decisions of the First, Sixth and Seventh Circuits.

Prompt resolution of these conflicts is a matter of fundamental importance. Until reversed or set aside, the Wisconsin Supreme Court's decision will needlessly inhibit and complicate the negotiation and enforcement of innumerable collective bargaining agreements. Under the Wisconsin Court's holding, parties to such agreements now have the option[3] of invoking state-law remedies

[3]Absent this state-law enforcement mechanism, the Wisconsin Court seemed to assume the IAM would be remediless. This assumption is entirely misplaced. Under Section 301, a labor union fearing the consequences of a sale of business may in appropriate circumstances invoke arbitration, *Howard Johnson Co.* v. *Detroit Local Joint Executive Board, Hotel and Restaurant Employees*, 417 U.S. 249 (1974), or may seek a "status quo" injunction to determine the rights of the parties and protect the interests of workers under collective bargaining agreements. *See*

*(Footnote continued on following page)*

and needlessly complicating the otherwise orderly resolution of routine disputes through negotiation, administration and enforcement of labor contracts, to say nothing of disputes involving leveraged buyouts where millions of dollars are commonly at stake.

## I. The Wisconsin Supreme Court's Decision Conflicts With Prior Decisions Of This Court And Pertinent Decisions Of The Federal Courts Of Appeals.

This case is fundamentally a state-law action to enforce rights under collective bargaining agreements. But this Court has consistently held that " '[s]tate law does not exist as an independent source of private rights to *enforce* [such] contracts.' " *Caterpillar*, 482 U.S. at 394 (emphasis added). This is because "substantive principles of federal labor law must be paramount in the area covered by the statute." *Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962). Resort to state law is prohibited because "[t]he

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*Howard Johnson*, 417 U.S. at 258 n.3; *Local 1266, International Association of Machinists* v. *Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981) (affirming preliminary injunction restraining completion of sale of corporate assets pending a decision by an arbitrator on IAM's claim that sale violated applicable collective bargaining agreement to prevent "frustration of arbitration" as required by Section 301). *Accord United Food and Commercial Workers, Local 626* v. *Kroger Co.*, 778 F.2d 1171 (6th Cir. 1985), *cert. denied*, 479 U.S. 815 (1986) (recognizing right to seek status quo injunction pending sale of stores under Section 301 but denying relief on facts of case); *Lever Bros. Co.* v. *International Chemical Workers Union*, 554 F.2d 115 (4th Cir. 1976) (enjoining plant relocation pending arbitration under Section 301).

Further, it can be an unfair labor practice for the purchasing entity to refuse to bargain with the incumbent union or to hand it a *fait accompli* as to working conditions. *E.g., Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27 (1987) (requiring bargaining by successor employer); *Serrano* v. *Jones & Laughlin Steel Co., LTV Corp.*, 790 F.2d 1279 (6th Cir. 1986) (holding that, under guidelines of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), state-law fraud claims related to closure of plant are preempted by National Labor Relations Act).

possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Id.* Accordingly, "the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' " *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983). *See also Lingle* v. *Norge Division of Magic Chef, Inc.*, 108 S. Ct. 1877, 1881 (1988); *Caterpillar*, 482 U.S. at 394; *Electrical Workers* v. *Hechler*, 481 U.S. 851, 856-57 (1987); *Allis-Chalmers*, 471 U.S. at 209-10.

Furthermore, the "policies that animate § 301" require that "the pre-emptive effect of § 301 must extend beyond suits alleging contract violations," *Allis-Chalmers*, 471 U.S. at 210-11, including those in which the claims, though not breach of contract claims *per se*, are "substantially dependent on analysis of a collective-bargaining agreement." *Caterpillar*, 482 U.S. at 394. While it is true that there is no pre-emption as to "substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of [collective-bargaining] agreements," *Lingle*, 108 S. Ct. at 1883, such "independent," "substantive" rights are *not* at issue in this case. The Wisconsin Supreme Court held that Wisconsin's fraudulent conveyance act "confers no substantive rights . . . It is not intended to." *See* App. 16A. Rather, the fraudulent conveyance act exists to provide "but a remedy to assist in the satisfaction of [a] substantive claim"—here one having its "genesis" in the collective bargaining agreement. *See* App. 4A, 16A.[4]

[4]The Wisconsin Court demonstrated its confusion between substantive state rights which are independent of collective bargaining agreements and state remedies which are dependent upon such agreements by citing and relying upon *Baldracchi* v. *Pratt & Whitney Aircraft Division*, 814 F.2d 102 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2819 (1988) and *Air Line Pilots Assoc.* v. *UAL Corp.*, 874 F.2d 439 (7th Cir. 1989).

*(Footnote continued on following page)*

Additionally, although the Wisconsin Court persists in its view, as in *Lueck* v. *Aetna Life Insurance Co.*, 116 Wis. 2d 559, 342 N.W.2d 699 (1984), *rev'd*, 471 U.S. 202 (1985), that the remedies of the fraudulent conveyance act are "nonnegotiable," *see* App. 16A, this characterization cannot defeat pre-emption in an action, such as this one, to enforce collectively-bargained obligations:

> It is conceivable that a State could create a remedy that, although *nonnegotiable*, nonetheless turned on the interpretation of a collective bargaining agreement for its application. Such a remedy would be pre-empted by § 301.

*Lingle*, 108 S. Ct. at 1882 n.7 (emphasis added). The state-law remedy authorized in this case is, therefore, conceptually indistinguishable from the Wisconsin tort remedy for bad-faith handling of a claim for benefits under a collectively-bargained benefit plan, also sanctioned by the Wisconsin Supreme Court, but struck down by this Court in *Allis-Chalmers* as preempted by Section 301.[5]

Moreover, although the Wisconsin Supreme Court agreed that the IAM's very "status" as a "creditor" under Wisconsin law "is defined by one or more collective bargaining agreements," it went

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Rather than supporting the Wisconsin Supreme Court's holding here, both cases, as in *Lingle*, merely held that state *substantive* rights were not pre-empted by federal labor law. In *Baldracchi*, Section 301 was held not to pre-empt the state substantive right to be free from retaliatory discharge. In *Air Line Pilots*, the Seventh Circuit rejected UAL Corp.'s and the IAM's claim that the Railway Labor Act pre-empted the substantive requirements of Delaware takeover law.

[5]The Wisconsin Supreme Court's attempt to salvage the state remedies asserted here, because they are "significant ones in the panoply" of state remedies, *see* App. 19A, cannot succeed in light of this Court's holding that balancing of state and federal interests is "irrelevant" to Section 301 pre-emption because Congress "has provided that federal law must prevail." *Allis-Chalmers*, 471 U.S. at 214 n.9.

on to rule—in direct contravention of this Court's precedents—that "whether that status arose as the result of obligations to them under the collective bargaining agreements is immaterial. It is the [creditor] status that counts, not its origin." *See* App. 4A, 19A, 21A. This further holding does even greater violence to the purposes of the labor laws and the principles established by this Court. Far from being "immaterial," the "origin" of the IAM's creditor status—and petitioners' duties—makes *all* the difference, especially where, as here, state law fails to confer independent, "substantive" rights on those invoking it. *See Hechler*, 481 U.S. at 861-62 n.5 (where the " 'nature and scope of the duty . . . owed Plaintiff is determined by reference to the collective bargaining agreement,' " the claim must be pre-empted by Section 301); *Allis-Chalmers*, 471 U.S. at 216 (Wisconsin tort remedy is pre-empted because "the tort exists for breach of a 'duty devolv[ed] . . . by reasonable implication from the express terms of the contract,' the scope of which, crucially, is 'ascertained from a consideration of the contract itself' . . . [T]he duties imposed and rights established through the state tort derive from the rights and obligations established by the contract.")

It is also clear that this case would have been decided differently in at least four of the federal courts of appeals, none of which has permitted a state-law claim to proceed where, as here, the state law fails to confer substantive rights independent of the labor contract. In *Deford* v. *Soo Line R.R.*, 867 F.2d 1080, 1086 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 3265 (1989), a decision viewed as controlling by the dissent in this case, *see* App. 29A, the Eighth Circuit analyzed Section 301 and *Lingle* to hold that virtually identical claims under the Minnesota Fraudulent Transfer Act must be preempted by the Railway Labor Act.[6] Although

[6]On this basis, the *Deford* Court also concluded that the state-law suit was removable to federal court, and criticized a contrary Third Circuit decision, *Railway Labor Executives Association* v. *Pittsburgh & Lake Erie R.R.*, 858 F.2d 936 (3d Cir. 1988), as expressing an "unnecessarily

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the Eighth Circuit agrees with the Wisconsin Supreme Court that state fraudulent transfer statutes are "not substantive in nature," 867 F.2d at 1087, its holding is in stark conflict:

> [In *Lingle*, t]he Court stated that a retaliatory discharge claim is a substantive state claim, "which addresses purely factual questions pertaining to the conduct of the employee and the conduct and motivation of the employer." *Id.* 108 S.Ct. at 1882. Neither of these elements require a court to interpret the terms of a collective bargaining agreement. Thus, preemption was not warranted. The creditors rights asserted by Deford, by contrast, directly involve the interpretation of collective bargaining agreements.
>
> * * *
>
> In conclusion, Deford is essentially claiming that if the sale of rail lines from Soo Line to Wisconsin Central is not, in effect, unwound, the transaction will result in a breach of Soo Line's obligations under the existing collective bargaining agreements. Thus, by asserting state law claims, Deford seeks enforcement of the terms of the collective bargaining agreements. The fraudulent conveyance act serves only as an enforcement mechanism. We believe Deford is only trying to invoke a state law remedy in place of the mandatory and exclusive remedies of [federal law].

*Id.* at 1087-88. The Eighth Circuit is right and the Wisconsin Supreme Court is wrong. At least three other circuits have agreed with the Eighth Circuit's analysis and disagreed with that of the Wisconsin Supreme Court.[7]

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*(Footnote continued from previous page)*
narrow" view of preemption principles in the removal context as applied to claims brought by a labor union to secure contractual benefits under the Pennsylvania Uniform Fraudulent Conveyance Act. *Deford*, 867 F.2d at 1086.

[7]*See Terwilliger* v. *Greyhound Lines, Inc.*, 1989 WL 88968 (6th Cir. Aug. 10, 1989) (state-law fraud claim is pre-empted where rights sought to be vindicated arise, as here, solely under the terms of a collective bargaining agreement; *Lingle* inapplicable because no state substantive

*(Footnote continued on following page)*

Thus, although the conflict in rationales is most vividly spelled out in the Eighth Circuit's decision in *Deford*, 867 F.2d at 1086, it is quite clear that the specific question decided by the Wisconsin Supreme Court of the proper reach of Section 301 preemption would, on these facts, have been decided differently in any one of four federal courts of appeals.

## II. Prompt Resolution Of This Conflict Is A Matter Of Great National Importance

Finally, not only is there a fundamental conflict on the question presented here, but prompt resolution of the conflict is a matter of great national importance with profound, *immediate* implications. The Wisconsin Supreme Court's decision allowing fraud-

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rights involved); *Jackson* v. *Liquid Carbonic Corp.*, 863 F.2d 111 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 3158 (1989) (where state law would look to a collective bargaining agreement to assess expectations of privacy, and state-law did not "create a right that is *on its own terms* independent of [the] collective bargaining agreement" as in *Lingle*, state-law drug test challenge is pre-empted by Section 301) (emphasis added); *Gibson* v. *AT&T Technologies, Inc.*, 782 F.2d 686 (7th Cir.), *cert. denied*, 477 U.S. 905 (1986) (state-law fraud claim for willfully withholding information regarding labor contract benefits is pre-empted under *Allis-Chalmers*). *Cf. Wells* v. *General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989) (although free-standing, "extraneous promise concerning . . . future employment eligibility" is not preempted by Section 301, fraud claims addressing the "*contents*" of a labor contract are) (emphasis in original); *Newberry* v. *Pacific Racing Association*, 854 F.2d at 1142, 1150 (9th Cir. 1988) (state-law claims for breach of covenant of good faith and fair dealing and intentional infliction of emotional distress are pre-empted because resolution is dependent on analysis of the collective bargaining agreement).

*See also Milne Employees Association* v. *Sun Carriers*, 714 F. Supp. 1028 (N.D. Cal. 1989) (employee state-law action against former employer for fraudulently representing that trucking operations would remain open is pre-empted by Section 301 because claim is "inextricably intertwined" with collective bargaining agreement); *Brown* v. *Keystone Consolidated Industries, Inc.*, 680 F. Supp. 1212, 1218 (N.D. Ill. 1988) (under *Caterpillar*, *Hechler* and *Allis-Chalmers*, claims for fraudulent conveyance by employee "creditors" under a labor contract are "obviously" pre-empted by Section 301).

ulent conveyance actions "will have statewide, as well as nationwide, impact on mergers and acquisitions." App. 39A. During 1988 there were 318 transactions, involving in excess of $42.9 billion, which were in the form of a leveraged buyout. *See Leveraged Buyout Market Survey*, Merger & Aquisitions 64 (May/June 1989).[8] If followed, the Wisconsin decision will also have dramatic impact on countless mine-run disputes that would also otherwise be "grist in the mills of the arbitrators." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584 (1960). The "central role of arbitration" in labor disputes, *Allis-Chalmers*, 417 U.S. at 219, will be undermined because parties to collective bargaining agreements now have, under Wisconsin's rule, the option of avoiding arbitration and invoking the standing to sue conferred by such agreements to obtain state-law, non-substantive judicial remedies to secure rights the agreements grant. However, "[t]he parties [do] not bargain for facts to be found by a court, but by an arbitrator . . . [and *t*]*his is especially true when it comes to formulating remedies.*" *United Paperworkers International Union* v. *Misco*, 484 U.S. 29, 52 (1987) (emphasis in original).

Moreover, the Wisconsin Supreme Court's decision will profoundly complicate both the administration of innumerable *exist-*

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[8]Statutes similar to Wisconsin's fraudulent conveyance statute have been adopted in 34 states. 7A U.L.A. 100, 120 (1989 Supp.). As the Wisconsin Court of Appeals recognized, *see* App. 39A, "[l]everaged buyouts are becoming more common, as is the use of the UFCA to prevent such buyouts. *See, e.g. United States* v. *Tabor Court Realty Corp.*, 803 F.2d 1288, 1297 (3d Cir. 1986), *cert. denied, sub nom., McClellan Realty Co.* v. *United States*, 107 S. Ct. 3229 (1987)."

And, as in Wisconsin, see App. 21, the jurisdictions which have addressed the issue have concluded that such statutes do *not* supply a *substantive* cause of action. *E.g. A/S Kreditt Finans* v. *Cia Venetico De Navegacion*, 560 F. Supp. 705, 711 & nn.14-15 (E.D. Pa. 1983), *aff'd*, 729 F.2d 1446 (3d Cir. 1984); *Clark* v. *Rossow*, 134 Ariz. 490, 657 P.2d 903, 904 (Ct. App. 1982); *Blumenthal* v. *Blumenthal*, 303 Mass. 275, 21 N.E.2d 244, 246 (1939).

*ing* national agreements and the negotiation of new ones. This case demonstrates the point. The IAM here sues on behalf of its locals located in both Illinois and Wisconsin. The Seventh Circuit and district courts sitting in Illinois (*see supra* note 7) reject the Wisconsin Court's view that state-law remedies may be invoked with respect to labor agreements. Therefore, depending upon whether the forum is state or federal, employees in Wisconsin will have different remedies under the same contact and, in all events, the remedies of employees located in Illinois (where a fraudulent conveyance statute has *not* been adopted) under the same contract will differ from those of employees located in Wisconsin. *Lucas Flour*, 369 U.S. at 103-4. Thus, until reversed, the Wisconsin Supreme Court's decision will needlessly complicate the negotiation and administration of new and existing labor contracts, creating tactical opportunities and incentives for forum shopping and other attempts to broaden the relief available under such contracts in countless circumstances.

Significantly, this Court can end this potential confusion and disruption without burdening its docket. Because the Wisconsin Supreme Court's decision so thoroughly misapprehends settled principles—in precisely the way it did in *Allis-Chalmers*—it would be entirely appropriate for the Court summarily to vacate the decision of the Wisconsin Supreme Court and remand with directions to dismiss the complaint.

## CONCLUSION

For the reasons stated, this Court should grant the petition for certiorari, summarily vacate the Wisconsin Supreme Court's decision, and remand with directions that the complaint be dismissed as preempted. Alternatively, the Court should grant the petition and give the case plenary consideration.

Respectfully submitted,

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September 20, 1989

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# APPENDIX

No. 87-1784

# STATE OF WISCONSIN : IN SUPREME COURT

INTERNATIONAL ASSOCIATION OF MACHINISTS
& AEROSPACE WORKERS,
IAM LOCAL 437, IAM LOCAL 710,
IAM DISTRICT 10, IAM DISTRICT 172,
Individually and as authorized
representatives of all
IAM EMPLOYEES OF
UNITED STATES CAN COMPANY,
CONTINENTAL CAN COMPANY,
CCC SERIES 200, INC.,
INTER-AMERICAN PACKAGING, INC., and
GP ACQUISITION COMPANY, INC.,

*Plaintiffs-Appellants,*

*v.*

UNITED STATES CAN COMPANY,
a Georgia corporation,
CONTINENTAL CAN COMPANY, U.S.A., INC.,
a Delaware corporation,
CCC SERIES 200, INC.,
a Delaware corporation,
INTER-AMERICAN PACKAGING, INC.,
a Pennsylvania corporation,
GP ACQUISITION COMPANY, INC.,
a Pennsylvania corporation, and
JOHN DOE'S 1-100,
collectively referring to the banks,
and other lenders participating in
the financing of the acquisition of
Continental Can, packaging sector by
United States Can Company,

*Defendants-Respondents.*

APPEAL from a judgment of the Circuit Court for Racine County, STEPHEN A. SIMANEK, Circuit Judge. *Reversed and remanded.*

HEFFERNAN, CHIEF JUSTICE. This is an appeal on certification of the court of appeals from a judgment of the circuit court for Racine county, which dismissed the complaint of the International Association of Machinists & Aerospace Workers (IAM), some of its local unions, and, in a represented capacity, all the IAM employees of those locals brought against United States Can Company and Continental Can Company. We reverse and remand for further proceedings.[1]

The issue certified to us by the court of appeals was stated as:

"Whether an action under the Uniform Fraudulent Conveyance Act, ch. 242, Stats., is preempted by sec. 301 of the Labor Management Relations Act when brought by a union and employees against an employer."

Our response to this certified question must be: No. We conclude that this particular action involves only state law. The action is not preempted by the Labor Management Relations Act (LMRA).

Because the facts determine the application of the law, we recite them in some detail. The United States Can Company in the spring of 1987 agreed to buy the general packaging division of Continental Can Company in a highly leveraged buyout which, it is alleged, would encumber the assets of the packaging division with a debt of sixty-five million dollars, *i.e.*, the purchasers would finance their acquisition primarily by the pledge to lenders of the assets being acquired.

The plaintiffs are the International Association, its local unions, and the union employees of the packaging division plants

[1]Also taken on certification was an appeal from an order which denied IAM's motion to set aside the original dismissal. Because we conclude that the complaint was improperly dismissed, we need not consider the subsequent motion and order separately appealed by IAM.

located in Racine, Wisconsin, and Danville, Illinois. We refer to the plaintiffs herein as "unions." The defendants are the United States Can Company, the acquiring corporation, the Continental Can Company, whose packaging division is being acquired, and an acquisition company which has been established apparently to manage takeovers such as this one. Also joined as defendants are the lending institutions which would finance the takeover. We refer to all of them as "companies."

The unions for some time, not specifically disclosed in the pleadings, have been the bargaining representatives of the employees and are parties to collective-bargaining agreements on behalf of the workers with the Continental Can Company.

Because the unions assert that the buyout will leave a financially impaired employer, they have brought an action under Wisconsin law, ch. 242, Stats., the Uniform Fraudulent Conveyance Act (UFCA)[2] in a Wisconsin court to declare the transfer a fraudulent one under the provisions of the act and to enjoin the defendants "from selling, disposing, transferring or otherwise further conveying or encumbering any of the assets" that may be acquired by the transferee company. Other relief, including the appointment of a receiver to protect the employees and other creditors, is sought. No damages are asked for.

The essence of their complaint is that the terms of the buyout without fair consideration will leave the packaging division insolvent or inadequately capitalized, thus resulting in a constructive fraud on creditors under UFCA. Intentional fraud is also alleged.

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[2]The unions asserted claims under secs. 242.04, 242.05, and 242.07, Stats., which provide:

> 242.04 Contract producing insolvency, fraudulent. Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

*(Footnote continued on following page)*

The unions claim they are proper plaintiffs and have a creditor status by reason of Continental Can Company's obligations to them of $19,950,000 in matured or unmatured claims. While counsel at oral argument was unable to respond with precision to the components of this claimed obligation, the complaint makes clear that the genesis of the relationship is the employer-employee status, which is defined by one or more collective-bargaining agreements. It is asserted that the obligation of the employer consists of matured and unmatured claims for "wages, vacation pay, sick leave pay, life, health and accident insurance, pension contributions, and other employee benefits." The unions, as unions, separately assert that they are creditors of the employers for dues checkoffs.

After the complaint was served, the companies responded by moving to dismiss pursuant to sec. 802.06(3), Stats., on the ground that "this action is preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. sec. 185."[3]

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*(Footnote continued from previous page)*

242.05 Other specifications of legal fraud. Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuances of such business or transaction without regard to his actual intent.

242.07 Fraud in fact. Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, is fraudulent as to both present and future creditors.

[3]29 U.S.C. sec. 185(a) provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The trial judge, in deciding this motion, appropriately accepted the facts alleged in the complaint as correct; and it is to these facts, recited above, to which the parties have resorted in discussing this litigation.

The circuit judge reasoned that whatever rights the unions had derived completely from their collective-bargaining agreements and, therefore, any action brought on that creditor status was preempted by the LMRA.[4] He said in his opinion from the bench that "The claim is founded directly on rights created by the collective bargaining agreement." He stated the "resolution of the dispute under 242 will require this Court to evaluate and interpret a collective bargaining agreement."

After reviewing various decisions of the United States Supreme Court, he concluded by stating:

> "[A]pplying the rationale contained in the cases cited will require this Court to accept the federal dictate—the federal law dictate that a state court cannot step in and interpret and decide this case in this forum."

He stated he did not have "jurisdiction" to determine the dispute because it would require interpretation of the collective-bargaining agreements; and, therefore, the claim was dismissed.

The appeal by the unions from this order followed and was subsequently certified to this court.

It appears to us that the resolution of this case hinges on the proper characterization of the nature of the plaintiffs' claim. If

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[4]We note that the circuit judge repeatedly typified preemption under LMRA as preemption of the state forum. Preemption, if required under sec. 301(a), is preemption of state law. The state forum may be utilized for the litigation of a sec. 301(a) action if appropriate federal law is applied. See *Charles Dowd Box Co., Inc., v. Courtney,* 368 U.S. 502 (1962), and *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95 (1962), both of which hold that a state forum has jurisdiction but incompatible principles of state law must give way to the principles of federal labor law.

the claim substantially implicates rights governed by sec. 301 under LMRA, federal law must be applied. If the claim is properly characterized as a state creditor's action to obtain the remedies afforded by UFCA and requires no substantial interpretation of the collective-bargaining agreement as provided by Wisconsin statutes to protect creditors, Wisconsin law is applicable.

The mine-run case subject to preemption "is a contract claim in which a party to the collective-bargaining agreement expressly asserts that a provision of the agreement has been violated." *Electrical Workers v. Hechler,* 481 U.S. 851, 857 (1987). The case before us does not have that simplistic characteristic.

We first note the posture of the claim that the unions are creditors as defined by UFCA. The unions make that assertion for their members and for themselves. Under the procedural posture of the case, all parties agree that the allegations of the complaint must be taken as true. Also, it should be noted that one of the principal defendants, United States Can Company, denies any information on which it could form a belief as to the creditor status of the plaintiffs. Continental Can Company, the erstwhile employer, denies that any of the plaintiffs are creditors except for *de minimis* sums. Both of the principal defendants contend that what is relevant is not just that plaintiffs are, or could be, creditors, but that in any event they are creditors only by reason of the preexisting collective-bargaining agreements.

Essentially, the argument of each side relies upon United States Supreme Court cases. The unions, while recognizing the preemption of federal law in contract disputes over collective-bargaining agreements, point to the exceptions that appear both explicitly and implicitly in United States Supreme Court decisions that demonstrate that not all controversies that arise between parties to a collective-bargaining agreement are sec. 301 cases preempted by federal law. They conclude this is not a sec. 301 case.

The companies adopt the general proposition that any claims that are founded on rights created by collective-bargaining agreements are preempted by federal labor law. They argue that whatever rights the unions have as creditors arise out of collective-bargaining agreements.

The question of whether a claim exclusively involves state law or whether it implicates federal law and thus is subject to preemption is a matter of law. Accordingly, we need not give special deference to the determination of the trial judge. The controlling question of law is, however, not a simple one, and its answer is dependent upon federal law as stated by the United States Supreme Court and by other federal courts to the extent that they appear to speak definitively on this question of the preemptive effect of sec. 301. See *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 214 (1985).

The federal law is clear that, where there is a sec. 301 claim, federal substantive law (irrespective of the forum) must control. *Teamsters Local v. Lucas Flour Co.,* 369 U.S. 95, 103 (1962), rules out the application of incompatible state law and mandates that federal law must prevail in a sec. 301 case, stating:

> "The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements."

Thus, *Lucas* makes it clear that individual contract terms must have consistent meanings and that only uniform federal law is likely to obtain that result.[5]

The 1985 case of *Allis-Chalmers,* reversing a judgment of this court, 116 Wis. 2d 559, 342 N.W. 2d 699 (1984), is highly inform-

[5]In *Lucas,* the contract term under consideration was a compulsory-arbitration provision. The United States Supreme Court held that the Washington Supreme Court not only had jurisdiction of the sec. 301 claim, but also reached the correct ultimate result.

ative and emphasizes that not all disputes between parties to a collective-bargaining agreement are to be governed by federal law. The actual matter at issue—whether sec. 301 of the LMRA preempts the state court action for bad-faith delay in making disability-benefit payments—was, however, decided in favor of preemption contrary to the decision of this court.

*Allis-Chalmers* attempted to summarize some of the principles of sec. 301 preemption. Relying on *Lucas Flour, supra, Allis-Chalmers* stated that:

> "[A] suit in state court alleging a violation of a provision of a labor contract must be brought under sec. 301 and be resolved by reference to federal law. A state rule that purports to define the meaning or scope of a term in a contract suit therefore is pre-empted by federal labor law." At 210.

It found that, because the collective-bargaining agreement itself must be interpreted in terms of "good faith," the state could not add the gloss of breach-of-a-state-tort-duty to the collective-bargaining contract and, therefore, there was preemption.

*Allis-Chalmers* went on to limit the possible scope of its rule by stating:

> "Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by sec. 301 or other provisions of the federal labor law." At 211.

It further stated:

> "Clearly sec. 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of sec. 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." At 212.

The *Allis-Chalmers* court also said, in effect, that rights conferred by state law that are nonnegotiable in a collective-bargaining agreement are not subject to preemption.

In respect to the dispute before it, the United States Supreme Court concluded that the duty of good faith was already an implicit condition of the collective-bargaining agreement. That agreement required insurance coverage by the employer, and hence the question of good faith was "tightly bound with questions of contract interpretation that must be left to federal law." At 216.

The court specifically declined in *Allis-Chalmers* to pass judgment "on whether an independent, nonnegotiable, state-imposed duty which does not create similar problems of contract interpretation would be pre-empted under similar circumstances." At 217, n. 11. As pointed out above, however, a collective-bargaining agreement cannot provide for terms illegal under general state law.

It summarized the tenor of its holding, stating:

> "It is perhaps worth emphasizing the narrow focus of the conclusion we reach today. We pass no judgment on whether this suit also would have been pre-empted by other federal laws governing employment or benefit plans. Nor do we hold that every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by sec. 301. The full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis. We do hold that when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a sec. 301 claim, see *Avco Corp. v. Aero Lodge 735*, 390 U.S. 557 (1968), or dismissed as pre-empted by federal labor-contract law." At 220.

We believe that *Allis-Chalmers* substantially "said it all" in respect to preemption principles applicable to sec. 301. Cases

subsequent to *Allis-Chalmers* have, however, "fleshed out" the general principles set forth therein.

In *Electrical Workers v. Hechler,* 481 U.S. 851 (1987), the principles of *Allis-Chalmers* were applied without significant modification. There, the employee claimed that the union had breached its duty to provide her a safe workplace. The Supreme Court noted that, in the absence of an agreement, the duty would devolve upon the employer and, hence, the determination of whether the duty fell upon the union required interpretation of the collective-bargaining agreement—a process, the court said, that must yield to the application of uniform interpretations of the federal law. *Hechler* reiterated the rule of *Allis-Chalmers* that there was preemption when the resolution of a state claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract. *Hechler* at 859.

In the same court term as *Hechler,* the Supreme Court, in *Caterpillar Inc. v. Williams,* 482 U.S. 386 (1987), decided that, where employees had separate employment contracts and their rights were not dependent on the interpretation or application of the collective-bargaining contracts, the complaint for enforcement did not require evaluation under sec. 301 and was not removable to federal court.

While *Caterpillar* is not controlling in the instant case, its language is instructive. The Court in *Caterpillar,* relying on *Allis-Chalmers,* stated:

> "[A] plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective-bargaining agreement." At 396.
>
> In contrast, the Court pointed out that:
>
> "Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.' " At 394.

It could be asserted that *Caterpillar* expands the *Lucas Flour* test of preemption that arguably requires an express assertion that a collective-bargaining agreement has been violated, and supplants it with a test merely requiring that the claim be "founded directly on rights created by collective-bargaining agreements." At 394.

We are not persuaded that the test is different than that utilized in predecessor cases. The verbiage is slightly at variance, but the significance of that variance is not made apparent by the Court in *Caterpillar*. It is the facts there that constitute a significant variance.

That *Caterpillar* does not alter the previously stated rule is corroborated by the recent case of *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. , 108 S. Ct. 1877 (1988). There, the majority relied on the pre-*Caterpillar* formula that preemption turns on whether the state-law claim can be resolved without interpreting the collective-bargaining agreement. Lingle traced the history of sec. 301 preemption from *Charles Dowd Box Co., supra, Lucas Flour, supra,* and *Allis-Chalmers, supra,* and concluded that:

> "[I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are states) is pre-empted and federal labor-law principles—necessarily uniform throughout the nation—must be employed to resolve the dispute." At 1881.

Thus, it appears that the proper test is not esoteric, but practical—does the adjudication of the state-law claim depend on the interpretation of the collective-bargaining agreement?

Even so, recent precedent indicates that a court does not risk preemption merely because some aspects of the collective-bargaining agreement are examined in determining the state claim.

In *Lingle* itself, the Court pointed out that a finding of parallelism of some provisions of the collective-bargaining agreement with facts necessary to resolve a state-law claim does not necessarily compel sec. 301 preemption.

An opinion of the Court of Appeals for the Second Circuit in *Baldracchi v. Pratt & Whitney Aircraft Div.*, 814 F.2d 102 (2nd Cir. 1987), was cited with approval in *Lingle*, at 1885. That case held the fact that the terms of the collective-bargaining agreement were relevant in furnishing the basis for making an appropriate award of damages to an employee asserting a state claim did not require a finding of preemption. It was held that Baldracchi's right not to be wrongfully discharged for filing a worker's compensation claim was not dependent upon the collective-bargaining agreement, although, clearly, the measure of her redress—the damages—was dependent upon wages established by that agreement. *Baldracchi* referred to language in *Allis-Chalmers* that emphasized that "tangential" reference, or even dependence upon the terms of a collective-bargaining agreement for some purposes, did not impel a conclusion of preemption.

*Baldracchi* also seizes upon other points in the Supreme Court opinions referred to herein, *e.g.*, that some rights arising under state law are nonnegotiable (see *Allis-Chalmers* at 213 and 217 n. 11) and therefore cannot be inquired into by the federal law of labor contracts. *Baldracchi* points out that the right to file a worker's compensation claim is one of those rights. *Baldracchi* states that, if LMRA is interpreted to deny employees in a collective-bargaining unit a right to a state remedy enjoyed by employees who are not represented in collective-bargaining units, the policy of the federal labor act is turned "on its head." 814 F.2d at 107.

From these cases, we derive fairly simple principles that, as evidenced by divergent opinions of various federal cases, are not simple of application. We deem the basic and controlling principles to be these: A state court has concurrent jurisdiction over a

sec. 301 claim, subject to removal to a federal court; but, in any forum, a sec. 301 claim is always subject to the application of federal labor law.

If the claim does not require substantial interpretation of a collective-bargaining agreement, the application of federal law is not required. In determining whether the claim is preempted by sec. 301, the Supreme Court has stated the following guidelines:

> A suit brought in a state court directly alleging a violation of a labor contract must be brought under sec. 301 and resolved by reference to federal labor law. Where the particular dispute can only be resolved by interpretation of the collective-bargaining agreement, it is a claim under sec. 301 and is resolvable only by the federal labor law; however, there must be more than a "tangential" reliance upon the collective-bargaining agreement. The dispute in question or the issues for its resolution must be "tightly bound" to the interpretation of the collective-bargaining agreement. When resolution of the state claim is substantially dependent upon the analysis of terms in a collective-bargaining agreement, it must be treated as a sec. 301 claim or dismissed; or, under another formulation of the same rule, a state-law claim that is "founded" directly on the collective-bargaining agreement is a sec. 301 claim requiring resolution by federal labor law.

Having these "principles" in mind, we must determine their effect on the case before us. Using these principles, we reach the conclusion that this is not a sec. 301 case subject to preemption. It is an action brought to assert a state-law right to set aside what is alleged to be a fraudulent conveyance. Justice Stevens in footnote 12 of *Lingle,* at 1885—a unanimous decision—stressed that the collective-bargaining agreement might well be the predicate for determination of the extent or scope of the remedy to which a worker might be entitled under state law and, to the extent that the collective-bargaining agreement needed interpretation, federal law would govern that interpretation, but that use of federal law did not require preemption of the state claim.

In the instant case, the plaintiff unions stress that the terms of a collective-bargaining agreement need not be interpreted to give them the remedy sought under UFCA. They merely need be creditors—present or potential, contingent or matured—and no threshold amount is required. Whether their qualification as creditors can be proved remains to be seen; but, under the posture of this case, where the assertion is that the plaintiffs are creditors, that pleaded fact must be assumed to be true.

*DeFord v. Soo Line Railroad Co.*, 867 F.2d 1080 (8th Cir. 1989), considered whether a Minnesota UFCA action challenging a leveraged buyout was preempted by the Railway Labor Act. The court relied upon the language of *Allis-Chalmers* and concluded that the Minnesota state UFCA claim was entirely dependent on rights afforded by the preexisting collective-bargaining agreement and was, therefore, preempted. Chief Judge Donald Lay, dissenting, relied upon footnote 12 in *Lingle*, referred to above, and stated:

> "Interpretation of the collective bargaining agreement is required only to determine standing as a creditor, and to determine the amount of damages. The state statute creates an entitlement independent of the collective bargaining agreement, and is not preempted by the RLA." At 12.

We conclude that the analysis of Chief Judge Lay is the appropriate one under the guidelines of the Supreme Court itself. A creditor is defined by UFCA, sec. 242.01(3), Stats.: " 'Creditor' is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent."

Creditors under UFCA include holders of unreduced tort claims (*Marcus v. Kane,* 18 F.2d 722 (2nd Cir. 1927)), and employees with claims against their employer for services rendered (*Pallott v. LaSalle Roofing & Shingle Co.,* 254 N.Y.S. 748 (1931)). Both actual and constructive fraud are addressed by the act. While sec. 242.07 deals with conveyances that involve actual intent to defraud, sec. 242.04 covers conveyances where insolvency

results, and sec. 242.05 covers conveyances that leave a business with unreasonably small capital. Fraudulent conveyances may be blocked or annulled as provided by secs. 242.09 and 242.10. Constructive fraud claims under UFCA must also deal with the issue of whether the conveyances were made for fair consideration. *In re Bossell, Van Vechten & Chapman,* 30 Wis. 2d 20, 30, 139 N.W. 2d 639 (1966).

The companies emphasize that, under *Running v. Widdes,* 52 Wis. 2d 254, 190 N.W. 2d 169 (1971), UFCA is a statute that confers no substantive rights, but rather confers remedies upon creditors with existing substantive rights. The assertion is true but irrelevant. We do not see the plaintiffs' complaint as asserting that UFCA gives them creditor status. Rather, the claim is that they are creditors under the collective-bargaining agreements and are seeking to have the same remedies that are afforded to other creditors.[6]

As stated under the somewhat different, but pertinent, circumstances of *Baldracchi, supra,* it would be strange to deny workers in collective-bargaining units the benefits of the remedies afforded all other creditors by UFCA just because they are organized laborers. The most significant aspect of *Running v. Widdes* is given no emphasis by the companies herein. The opinion stated that the policy of the law is to benefit creditors and to give them a remedy in the event of fraudulent transfers and, as a remedial statute, UFCA should be liberally construed "to accomplish its purpose of giving speedy relief against a fraudulent debtor." At 259.

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[6]As stated above, their assertion of creditor status under the procedural posture of this case is not subject to question. Even the answer of Continental Can acknowledges that the plaintiffs may be creditors, but the answer brushes aside the legal significance of that status as a *de minimis* one. We need not address the question of whether a claimant whose claim is small can be barred from a plaintiff's status in a creditor's action to set aside a fraudulent conveyance. Suffice it to say no legal basis for that distinction is argued, nor need it be, for under the pleadings here the plaintiffs are creditors.

We see no force in the argument that UFCA is inapplicable because it confers no substantive rights. It does not. It is not intended to. What plaintiffs seek by use of UFCA is not the substantive right of a claim as creditor, but a remedy to assist in the satisfaction of that substantive claim.

We note that the case of *United States v. Tabor Court Realty Corp.*, 803 F.2d 1288 (3rd Cir. 1986), validates the use of a state UFCA proceeding by a creditor to challenge a leveraged buyout. The United States of America was a creditor for income taxes in the *Tabor* case, where there was a conveyance of a major coal producer's assets and where the transaction jeopardized the ability of the United States to collect taxes. The court found it was appropriate to apply Pennsylvania's fraudulent conveyance act for the protection of creditors to set aside the leveraged buyout. Labor unions and their members should not be denied this same remedial aspect of state law unless to afford such remedy in some way impinges upon, or interferes with, the underlying and paramount philosophy of LMRA that the same federal legal standards be applied nationally to the interpretation and application of collective-bargaining agreements. In this case, there is no evidence of any impingement upon basic philosophies of LMRA.

We also consider other language appearing in several of the opinions of the United States Supreme Court that impels the conclusion we reach here.

It is rather obvious that, if the result sought to be achieved by the state claim or action cannot be the subject of any collective-bargaining agreement, it is nonnegotiable. Hence, the assertion of such claim can have no effect on labor negotiations or on collective-bargaining agreements. See *Allis-Chalmers* at 211, 212. It would be difficult to assert that an agreement to submit to, or be victimized by, fraudulent conveyors is an agreement that could be negotiated legally under any system of law by parties to a collective-bargaining agreement. Certainly, the rights under

UFCA are not rights that a party to this litigation contends may be bargained away. *Allis-Chalmers* at 212 noted that sec. 301 does not grant parties to a collective-bargaining agreement the ability to contract for what is illegal under the state law or to forego rights or obligations under state law that are independent of the labor contract. We do not see the defendant companies claiming that the right to assert the remedies of UFCA have been bargained away or can be bargained away in any collective-bargaining agreement. More to the point, the above language of *Allis-Chalmers* makes it clear that the right to use UFCA need not hinge upon any possible interpretation of a collective-bargaining agreement. *Allis-Chalmers,* at 217, made a significant point in asserting that parties to a labor contract are free to bargain in respect to what constitutes "good faith" in an insurance agreement. If effect (*sic*), the Supreme Court concluded that, although "good faith" was a concept of state tort law, it was bargainable and negotiable in a collective-bargaining agreement because it involved terms and conditions in respect to the timeliness and methods of insurance benefit payments agreed upon in the collective-bargaining agreement.

It could be argued that a conveyance which is denominated as a constructive fraud only by reason of its consequences—such as undercapitalization or insolvency—could be an appropriate subject for labor negotiations. Such fraud after all is only of a type that is presumed in law. The fraud alleged in the third count of the complaint of the unions is brought under the provisions of sec. 242.07, Stats., *Fraud in fact.* The allegation is one of intentional fraud. Such conduct is proscribed by law and cannot be negotiable. The purpose of a uniform federal labor law cannot be furthered by any ratiocination that actual fraud is an appropriate or negotiable subject of a collective-bargaining agreement.

The language of Judge Richard Posner in the recent case of *Air Line Pilots Assoc. International v. UAL Corporation, International Association of Machinists & Aerospace Workers,* Nos. 83-3308, 88-

3377, and 88-3387 (7th Cir. 1989), is by analogy appropriate to the use, in this case, of UFCA to control alleged illegal aspects of a corporate takeover. The Seventh Circuit case involved the applicability of a Delaware anti-takeover law, which was invoked to avoid a hostile leveraged buyout. It was claimed that the law of the State of Delaware was preempted by the Railway Labor Act, an act that has been interpreted to have as much preemptive effect as sec. 301 actions under LMRA. The Seventh Circuit said the Delaware law was not preempted and stated that preemption would be contrary to public policy and that an anti-takeover clause in a collective-bargaining agreement was a nullity. Judge Posner wrote:

> "Although preemption does not seem required to further the objectives of federal law, it could have a catastrophic effect on the efforts of states to regulate takeovers, and this consideration is germane since, realistically, a judgment about preemption requires a weighing of federal and state interests. See, e.g., Local 926, International Union of Operating Engineers v. Jones, 460 U.S. 669, 676 (1983); Belknap, Inc. v. Kale, supra, 463 U.S. at 498. Any firm that had a collective-bargaining agreement with a significant fraction of its work force could adopt anti-takeover measures with complete impunity, simply by writing them into the collective-bargaining agreement. Unionized firms would be immune to hostile takeovers, if, as is common, [*24] the union feared that a buyer of the company would seek to economize on its labor costs by renegotiating the company's collective-bargaining agreements or even by selling off the company's assets to purchasers who would take free of any obligation under such agreements. For us to create in the name of preemption so enormous a loophole in state regulation, without any evidence that the loophole is necessary to protect the objectives of federal labor law, would be reckless. Like the criminal law, the regulation of corporations is, as the Supreme Court reminded us in the CTS case, a matter of primary state responsibility. See 107 S. Ct. at 1550-52; see also Cort v. Ash, 422 U.S. 66, 84-85 (1975). In such areas the presumption is against federal preemption. California v.

ABC American Corp., 57 U.S.L.W., 4425, 4427 (S. Ct. April 18, 1989). And presumption or not, we do not think that the framers of the Railway Labor Act meant to deal the body blow to state regulation of corporations that a finding of preemption in this case would administer." 1989 U.S. App. Lexis 6521, 21.

In a vein similar to that of Judge Posner's opinion, we have already explained that these claims require only tangential reference to the collective-bargaining agreement. No substantial interpretation is required. On the other hand, we conclude that the rationale for the objection to UFCA in this case on the ground that it might interfere with the federal labor law goal of uniformity is hard to understand. It would appear that the suppression of fraud, presumed or factual, even in the civil sense, is so closely related to the criminal law that the state has a substantial interest that should not be tampered with unless the paramount interest of the federal government in uniform labor law in the particular case is demonstrated.[7] It would appear that an area of state law such as that which we have under consideration here—fraudulent conveyances—is one in which the presumption should be against federal preemption.

In respect to the arguments of the defendants that the rights afforded by UFCA are remedial only, we respond by pointing out that the rights, because they are remedial, are significant ones in the panoply of most states' arsenals against those who would defraud creditors. A substantial state interest is at stake that should not be displaced upon a mere assertion that the uniformity of federal labor laws will be put in jeopardy. Defrauded creditors' rights should not be allowed to go

[7]We point out that we do not balance the importance, in terms of policy, of the state claim against the preemptive effect of federal law. As *Allis-Chalmers* at 214, n. 8, makes clear, balancing or weighing of the comparative importance of state law is irrelevant and inappropriate. Rather, we state that an important state value should not be discarded lightly unless there is preemption under the federal law.

unvindicated by merely asserting that the use of UFCA raises the spectre of non-uniform interpretations of collective-bargaining agreements. There is no showing of such a consequence here. Under the facts of this case, as well pleaded in the complaint, the unions and their members are creditors and are entitled to assert the remedy afforded by UFCA.

In conclusion, then, we hold that the cause of action asserted is a state claim, not a sec. 301 claim subject to preemption. There is no "substantial" dependency on a collective-bargaining agreement. The right claimed at the most requires only "tangential" reference to the collective-bargaining agreement. The rights arise under the state statute, not under any collective-bargaining agreement. There is no "intertwining." The state claim arises under an entirely separate aggregation of rights not even remotely concerned with labor law—state or federal. Nor are the rights being asserted in any way founded upon a substantial interpretation of a collective-bargaining agreement, nor, as we point out, could they be. The unions are not seeking directly to enforce their collectively-bargained rights to wages or other benefits. Rather, they seek to utilize UFCA to prevent their *debtor* from putting itself in a posture that may fundamentally compromise its ability to meet its obligations to its creditors; and there has been no showing by the companies that this claim will require substantial interpretation of the collective-bargaining agreement or that it will impinge upon the acknowledged value in having uniform federal labor law. There is simply no logical reason for this attempt to preempt an important area of state creditor law.

The only question of any real importance at this stage of the litigation is the unions' creditor status. Given the broad definition of "creditor" that appears in sec. 242.01(3),[8] it cannot be doubted

[8] "242.01(3) 'Creditor' is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent."

that the plaintiffs here have the standing and the factual posture under the complaint to bring this state action.

While their status as creditors in fact may be challenged upon remand, whether that status arose as the result of obligations to them under the collective-bargaining agreement is immaterial. It is the status that counts, not its origin. To determine whether the unions and their members are creditors, simpliciter, is a perfunctory exercise not dependent upon any substantial interpretation of collective-bargaining agreements. It is a determination that has no dependency upon the application of federal labor law.

Upon remand, additional issues will be posed: Whether the company has rendered itself insolvent by the transaction, whether it will be unreasonably undercapitalized, whether the consideration for the transfer was fair, and whether there was, as alleged, constructive and actual fraud perpetrated on the creditors. At the most, however, we anticipate that any references in future stages of this litigation to collective-bargaining agreements will be "tangential." The claim is not predicated or dependent upon any provision of the agreement. What the unions and their employees seek is an injunction to set aside or avert what is alleged to be a fraudulent transaction. While this may involve complicated arithmetical calculations and accounting procedures, we do not see a possibility that, for the purposes of the remedy sought to be afforded by ch. 242, Stats. (UFCA), the collective-bargaining agreement need be substantially considered. Federal preemption by the application of federal labor law under sec. 301 of LMRA is inappropriate. This is not a dispute that, in its present state-claim posture, implicates federal labor law.

By the Court.—Judgment reversed and cause remanded.

No. 87-1784

# STATE OF WISCONSIN : IN SUPREME COURT

INTERNATIONAL ASSOCIATION OF MACHINISTS
& AEROSPACE WORKERS,
IAM LOCAL 437, IAM LOCAL 710,
IAM DISTRICT 10, IAM DISTRICT 172,
Individually and as authorized
representatives of all
IAM EMPLOYEES OF
UNITED STATES CAN COMPANY,
CONTINENTAL CAN COMPANY,
CCC SERIES 200, INC.,
INTER-AMERICAN PACKAGING, INC., and
GP ACQUISITION COMPANY, INC.,

*Plaintiffs-Appellants,*

*v.*

UNITED STATES CAN COMPANY,
a Georgia corporation,
CONTINENTAL CAN COMPANY, U.S.A., INC.,
a Delaware corporation,
CCC SERIES 200, INC.,
a Delaware corporation,
INTER-AMERICAN PACKAGING, INC.,
a Pennsylvania corporation,
GP ACQUISITION COMPANY, INC.,
a Pennsylvania corporation, and
JOHN DOE'S 1-100,
collectively referring to the banks,
and other lenders participating in
the financing of the acquisition of
Continental Can, packaging sector by
United States Can Company,

*Defendants-Respondents.*

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LOUIS J. CECI, J. (*Dissenting.*) I dissent. I would find that the unions' cause of action under the Uniform Fraudulent Convey-

ance Act, ch. 242, Stats. (1985-86), is preempted by § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, because resolution of the unions' cause of action before this court will require substantial interpretation of the collective bargaining agreement between the unions and Continental Can Company (Continental). I am at a loss to understand how the majority could conclude otherwise.

Section 301(a) of the LMRA, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

In *Textile Workers v. Lincoln Mills,* 353 U.S. 448 451 (1957), the United States Supreme Court held that § 301 not only provides federal court jurisdiction over controversies involving collective bargaining agreements but also "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements." *See also Lingle v. Norge Division of Magic Chef, Inc.,* 108 S.Ct. 1877, 1880 (1988). The Court later concluded that state courts have concurrent jurisdiction over § 301 claims. *Charles Dowd Box Co., Inc. v. Courtney,* 368 U.S. 502 (1962). However, state as well as federal courts must apply federal law in deciding such claims. *Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 102 (1962); *Lingle,* 108 S.Ct. at 1880 n. 2.

In *Lucas Flour,* the Court was confronted with the issue of whether a collective bargaining agreement implicitly prohibited a strike that had been called by the union. The Washington Supreme Court had answered that question by applying state law rules of contract interpretation. *Lucas Flour,* 369 U.S. at 102. The

Court rejected that approach and held that § 301 mandated resort to federal rules of law in order to ensure uniform interpretation of collective bargaining agreements because "[t]he possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Id.* at 103.

In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985), the Court considered the issue of whether § 301 of the LMRA preempted a state law tort action for bad-faith delay in making disability benefit payments due under a collective bargaining agreement. The Court held that "[t]he interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation." *Id.* at 211. Consequently, since reference to the collective bargaining agreement as to the manner in which a benefit claim would be handled would necessarily have been relevant to any allegation that the claim was handled in a dilatory manner, the Court held that § 301 preempted the application of the state law tort remedy. *Id.* at 218-19. The Court concluded by holding "that when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, *see Avco Corp. v. Aero Lodge 735*, 390 U.S. 557 (1968), or dismissed as pre-empted by federal labor-contract law." *Id.* at 220; *see also Lingle*, 108 S.Ct. at 1883-84 n. 10; *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394 (1987).

Therefore, § 301 of the LMRA preempts state law claims which are founded directly on rights created by the collective bargaining agreements or which are substantially dependent upon analysis of a collective bargaining agreement. *Caterpillar*, 482 U.S. at 394; *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851, 859 n. 3 (1987); *Evans v. Einhorn*, 855

F.2d 1245, 1251 (7th Cir. 1988); *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1396 (9th Cir. 1988). If the resolution of a state law claim depends upon the meaning of a collective bargaining agreement, the application of state law is preempted. *Lingle*, 108 S.Ct. at 1881.

In the case before this court, the unions' complaint expressly sets out that the debts the unions are seeking to secure exist solely because of the collective bargaining agreement. Paragraphs 1 and 3 of the complaint state in part:

> 1. . . . Plaintiffs are creditors of defendants with respect to wages, employee benefits, pension and welfare benefits, collective bargaining dues 'check-offs', and other matured and unmatured claims, pursuant to the collective bargaining agreement between the IAM and the defendants. . . .
>
> . . .
>
> 3. The IAM employees of the defendants are creditors of defendants *under the terms of the IAM Continental collective bargaining agreement in the approximate amount of $19,950,000.* This indebtedness is comprised of matured as well as unmatured claims over the life of plaintiffs' current collective bargaining agreement for wages, vacation pay, sick leave pay, life, health and accident insurance, pension contributions, and other employee benefits, as well as claims asserted in various grievance and arbitration proceedings, *all owed to the employees pursuant to the collective bargaining agreement.*

(Emphasis added.) The unions' complaint also sets out the basis of its claims. Paragraphs 21, 25, and 27 of the complaint state:

> 21. As a result of defendant U.S. Can's acquisition of the Continental packaging sector pursuant to the merger transaction between the parties, defendants have made and will make conveyances and incur obligations which will render the surviving entity insolvent within the meaning of Section 4 of the Uniform Fraudulent Conveyance Act, Wis. Stat. § 242.04. These conveyances and obligations, as more fully

set forth in paragraphs 11 through 17, *supra,* will render the merged entity insolvent in that the fair saleable value of the available, unemcumbered post-merger assets will be far less than the amount that the post-merger enterprise will need to pay its probable liabilities or its existing debts as they become absolute and matured.

. . .

25. The transaction which defendants have completed, or are about to complete, involves conveyances and obligations on the part of defendants which will leave the surviving merged entity severely and unreasonably undercapitalized within the meaning of § 5 of the Uniform Fraudulent Conveyance Act, Wis. Stat. § 242.05. The property remaining in the surviving entity's hands upon completion of the merger transaction will be so encumbered by pledges, liens, and security interests that the surviving entity will be left with effectively no working capital, but will have insurmountable debt.

. . .

27. The conveyances and transfers which defendants have completed, or are about to complete, as part of the U.S. Can acquisition of the Continental packaging sector have been made to hinder, delay, or defraud plaintiffs, who are both present and future creditors of defendants, within the meaning of Section 7 of the Uniform Fraudulent Conveyance Act, Wis. Stat. § 242.07.

Consequently, in order to determine whether U.S. Can's acquisition of Continental's packaging division pursuant to the merger transaction between the parties will render the surviving entity insolvent, a circuit court would have to determine, under § 242.04, Stats., whether the present fair salable value of Continental's assets is less than the amount that will be required to pay Continental's liability on its existing debts as they become absolute and matured. Furthermore, in order to determine whether U.S. Can's acquisition of Continental's packaging division pursuant to the merger transaction between the parties would leave the

surviving entity severely and unreasonably undercapitalized under § 242.05, Stats., the court would have to determine whether the property remaining after the conveyance is an unreasonably small capital. Finally, in order to determine whether U.S. Can's acquisition of Continental's packaging division pursuant to the merger transaction between the parties was made to hinder, delay, or defraud the unions under § 242.07, Stats., the court would have to determine the companies' actual intent.

In order to resolve these issues, the court would have to balance Continental's assets against its liabilities. To determine Continental's liabilities, the court would have to interpret the terms of the collective bargaining agreement to determine if the unions' claim of $19,950,000 in matured and unmatured claims over the life of the unions' current collective bargaining agreement for wages, vacation pay, sick leave pay, life, health and accident insurance, pension contributions, and other employee benefits as well as claims asserted in various grievance and arbitration proceedings is correct. Making such a determination would *undoubtedly* force the court to construe the meaning and import of the numerous provisions of the collective bargaining agreement in light of the provisions and definitions of the Uniform Fraudulent Conveyance Act.[1] Such substantial interpretation of the collective bargaining agreement by a state court to determine rights under state law would result in precisely the outcome that the doctrine of preemption under § 301 is supposed to prevent.

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[1]I note that:

"A collective-bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state law suit is entitled. See *Baldracchi v. Pratt & Whitney Aircraft Div., United Technologies Corp.*, 814 F.2d 102, 106 (CA2 1987). Although federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state law claim, not otherwise pre-empted, would stand. Thus, as a general proposition, a state law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement

*(Footnote continued on following page)*

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation.

*Lucas Flour,* 369 U.S. at 103-104.

In *Brown v. Keystone Consolidated Industries, Inc.,* 680 F. Supp. 1212, 1216 (N.D. Ill., 1988), the United States District Court was confronted with a situation similar to the one presently before this court. Keystone Consolidated Industries, Inc. (Keystone), in order to alleviate its fiscal woes, allegedly conspired with Frank L. Corral (Corral) to circumvent Keystone's Chicago Heights Steel Division's (CHS Division) collective bargaining agreement and its pension agreement with its employees by executing a sham transaction in which Keystone would sell its CHS Division to a purported "independent buyer" who in reality was Corral, CHS Division's vice president and general manager. In

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*(Footnote continued from previous page)*

> and a separate state law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the *separate* state law analysis would not be thereby pre-empted."

*Lingle,* 108 S.Ct. at 1885 n. 12 (emphasis added).

However, in the case before this court, the state law claim is not separate because liability, not just damages, is decided by reference to the collective bargaining agreement. The companies' liability under state law is decided by reference to the collective bargaining agreement. As a result, *Baldracchi* is not applicable to the situation before this court.

this manner, Keystone would allegedly continue to realize profits from the operation of the CHS Division business without being saddled with the obligations under its collective bargaining and pension agreements. *Id.*

The plaintiffs, thirty-five former employees of CHS Division, alleged in part that they were preexisting creditors of Keystone in that Keystone owed the plaintiffs substantial sums of money in the form of pension and retirement benefits and contractual obligations under their collective bargaining agreement. *Id.* at 1219. The plaintiffs further alleged that the conveyance of Keystone to CHS Acquisition, which was incorporated by Corral and represented as an "independent buyer," was a false and fraudulent conveyance entered into by those parties for the purpose of avoiding the claims of the plaintiffs. *Id.*

The district court held:

> This cause of action, like the claim for common law fraud, is preempted by both the LMRA and the NLRA. As the plaintiffs' allegations concede, they are only 'preexisting creditors' of Keystone to the extent that Keystone owes them monies under the terms of the CBA and Pension Agreement. Indeed, the Shutdown Agreement also directly addresses the plaintiffs' eligibility for these benefits. Thus, it would be necessary to analyze the terms of at least *three* labor agreements in order to resolve the plaintiffs' fraudulent conveyance claim. Obviously, then, this cause of action is preempted by sec. 301.

*Id.* at 1219 (emphasis in original).

In *Deford v. Soo Line R. Co.*, 867 F.2d 1080, 1081-82 (8th Cir. 1988), employees adversely affected by the sale of a portion of a railroad's rail lines and a labor association brought an action alleging common law creditors' rights violations and a Minnesota Uniform Fraudulent Transfer Act violation in state court. The employees attempted to avoid removal of their action to federal

court by arguing that the Minnesota Fraudulent Transfer Act imposed duties and obligations on all creditors completely independent of any collective bargaining agreement. *Id.* at 1087.

The court of appeals found that the existence and extent of the creditors' rights asserted by the employees could be determined only by interpreting the collective bargaining agreements. *Id.* at 1086. The court noted that the employees, in their complaint, predicated their claims upon entitlements to accrued but unpaid wages, vacation pay, life and health insurance, pension contributions, and severance benefits arising "pursuant to continuing labor contracts and employee protection agreements." *Id.* Therefore, the court concluded that the creditors' rights asserted by the employees directly involved the interpretation of collective bargaining agreements and were, therefore, preempted under the Railway Labor Act (RLA), 45 U.S.C. §§ 151-188 (1982). *Id.* at 1087.

Similarly, I would hold in the case before this court that the unions' cause of action under the Uniform Fraudulent Conveyance Act, ch. 242, Stats., is preempted by § 301 of the LMRA, 29 U.S.C. § 185, because resolution of the unions' cause of action before this court will require substantial interpretation of the collective bargaining agreement between the unions and Continental Can Company. The majority opinion is simply wrong when it asserts that "any references in future stages of this litigation to collective-bargaining agreements will be 'tangential.' " Majority op. at 28.

For the above reasons, I respectfully dissent.

I am authorized to state that Justice William G. Callow and Justice Donald W. Steinmetz join in this dissenting opinion.

**SUPREME COURT**
**OF WISCONSIN**
**P.O. BOX 1688**
**MADISON, WI 53701-1688**

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**REMITTITUR**

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, IAM LOCAL 437, IAM LOCAL 710,
IAM DISTRICT 10, IAM DISTRICT 172 INDIVIDUALLY AND AS AUTHORIZED REPRESENTATIVES OF ALL IAM EMPLOYEES OF UNITED STATES CAN COMPANY, CONTINENTAL CAN COMPANY, CCC SERIES 200, INC. INTER-AMERICAN PACKAGING, INC., AND GP ACQUISITION COMPANY, INC.,

*Plaintiffs-Appellants,*

*v.*

UNITED STATES CAN COMPANY, A GEORGIA CORPORATION, CONTINENTAL CAN COMPANY, U.S.A., INC., A DELAWARE CORPORATION,
CCC SERIES 200, INC., A DELAWARE CORPORATION, INTER-AMERICAN PACKAGING, INC., A PENNSYLVANIA CORPORATION,
GP ACQUISITION COMPANY, INC., A PENNSYLVANIA CORPORATION, AND JOHN DOE'S 1-100, COLLECTIVE REFERRING TO THE BANKS, AND OTHER LENDERS PARTICIPATING IN THE FINANCING OF THE ACQUISITION OF CONTINENTAL CAN, PACKAGING SECTOR BY UNITED STATES CAN COMPANY,

*Defendants-Respondents.*

APPEAL NO. 87-1784

T.Ct. NO. 87-CV-1349

THIS CAUSE WAS AN APPEAL TO REVIEW THE JUDGMENT AND ORDER OF THE CIRCUIT COURT OF RACINE COUNTY. UPON CONSIDERATION, IT IS ORDERED AND AJUDGED BY THIS COURT IN AN OPINION FILED ON JUNE 27, 1989, THAT:

JUDGMENT REVERSED AND CAUSE REMANDED.

NATHAN S. HEFFERNAN Wrote Decision/Opinion
WILLIAM G. CALLOW Joined Dissenting Opinion
DONALD W. STEINMETZ Joined Dissenting Opinion
LOUIS J. CECI Wrote Dissenting Opinion

THE APPEAL RECORD IS HEREBY RETURNED TO THE CLERK OF CIRCUIT COURT FOR RACINE COUNTY.

I CERTIFY THAT THE ABOVE IS A CORRECT TRANSCRIPT OF THE ORIGINAL ORDER AND JUDGMENT OF THE COURT IN THE ABOVE-ENTITLED CAUSE.

DATED:
AUGUST 01, 1989.

/S/MLG

MARILYN L. GRAVES
*CLERK, SUPREME COURT*

**Office of the Clerk**
**SUPREME COURT**
**STATE OF WISCONSIN**

Hon. Stephen A. Simanek
Circuit Court of Racine
County
Racine County Courthouse
Racine, WI 53403

Madison, September 13, 1988

To David L. Uelmen
Previant, Goldberg, Uelmen,
Gratz, Miller &
Brueggeman
P. O. Box 92099
Milwaukee, WI 53202
*

Stephen H. Skoller
Lowenstein, Sandler, Kohl,
Fisher & Boylan
65 Livingston Ave.
Roseland, N.J. 07068

The Court today announced an order in your case as follows:

No. 87-1784 *International Ass'n of Machinists & Aerospace Workers, et al. v. United States Can Company, et al.*

The court having considered the request of the court of appeals pursuant to sec. (rule) 809.61, Stats., that this court accept the certification of this appeal;

IT IS ORDERED, the certification request is granted and jurisdiction of the appeal is accepted; and

IT IS FURTHER ORDERED, the briefs previously submitted by the parties to the court of appeals may stand as the briefs of the parties in this court. The parties shall submit 10 additional copies of their briefs within 10 days of the date of this order. The parties will be notified of the date and time for oral argument in this appeal.

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MARILYN L. GRAVES
*Clerk of Supreme Court.*

IN COURT OF APPEALS OF WISCONSIN
DISTRICT II

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS,
IAM LOCAL 437, IAM LOCAL 710, IAM DISTRICT 10, IAM DISTRICT 172
individually and as authorized representatives of all IAM EMPLOYEES OF UNITED STATES CAN COMPANY, CONTINENTAL CAN COMPANY,
CCC SERIES 200, INC. INTER-AMERICAN
PACKAGING, INC., AND GP ACQUISITION
COMPANY, INC.,

*Plaintiffs-Appellants,*

*v.*

UNITED STATES CAN COMPANY, a Georgia corporation, CONTINENTAL CAN COMPANY, U.S.A., INC., a Delaware corporation, CCC SERIES 200, INC., a Delaware corporation, INTER-AMERICAN PACKAGING, INC., a Pennsylvania corporation
GP ACQUISITION COMPANY, INC., a Pennsylvania Corporation, and JOHN DOE'S 1-100, collectively referring to the banks, and other lenders participating in the financing of the acquisition of Continental Can, packaging sector by United States Can Company,

*Defendants-Respondents.*

CERTIFICATION

No. 87-1784

Before Scott, C.J., Brown, P.J., and Nettesheim, J.

Pursuant to Rule 809.61, Stats., this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

## ISSUE

Whether an action under the Uniform Fraudulent Conveyance Act, ch. 242, Stats., is preempted by sec. 301 of the Labor Management Relations Act when brought by a union and employees against an employer.

## FACTS

The plaintiffs in this action are the International Association of Machinists and Aerospace Workers, several of the union's local and district organizations, and the union employees of the companies below (collectively IAM). The defendants include United States Can Company (U.S. Can), Continental Can Company, U.S.A., Inc. (Continental Can), and several other corporations and unidentified lenders allegedly involved in the purchase transaction. To the extent that the defendants are aligned, we will refer to them collectively as "the companies."

IAM brought this action under the Uniform Fraudulent Conveyance Act (UFCA), ch. 242, Stats.[1] IAM alleged that a leveraged buyout of Continental Can by U.S. Can violated secs. 242.04, 242.05 and 242.07 of the UFCA. IAM alleged that it had standing as a creditor because of the collective-bargaining agreement.

The companies moved to dismiss the action on the ground that it was preempted by sec. 301 of the Labor Management Relations Act (LMRA), 29 U.S.C.A. sec. 185. The trial court granted the motion, finding that: (1) the state action was based on rights arising out of the collective-bargaining agreement; and (2) resolution of the dispute would require interpretation of that agreement.

[1]The UFCA was repealed and recreated by 1987 Wis. Act 192 (eff. Apr. 8, 1988). Because this action was brought before the effective date, all references to ch. 242, Stats., are as they existed prior to repeal.

IAM then brought a motion for relief from judgment premised upon discovery documents received on the day of the motion hearing. IAM alleged that from these documents it first became aware that U.S. Can, the successor corporation, had repudiated the collective-bargaining agreement and that the alleged fraudulent transactions took place thereafter. As a result of this knowledge, IAM sought relief on the bases of surprise, newly discovered evidence, misrepresentation or "other reasons justifying relief." Sec. 806.07(1)(a)-(c), (h), Stats. The motion for relief was denied, and IAM appealed from the earlier judgment of dismissal and the order denying its motion for relief.

## PREEMPTION UNDER THE LMRA

Section 301 of the LMRA preempts state law claims which are founded directly on rights created by collective-bargaining agreements or which are substantially dependent upon analysis of the terms of a collective-bargaining agreement. *Caterpillar, Inc. v. Williams*, 107 S. Ct. 2425, 2431 (1987). The purpose of preemption is to ensure uniform interpretation of collective-bargaining agreements and to promote the peaceable, consistent resolution of labor-management disputes. *Lingle v. Norge Div. of Magic Chef, Inc.*, 108 S. Ct. 1877, 1880 (1988).

A state claim is not preempted merely because its resolution would require addressing the same set of facts which resolution of a collective-bargaining dispute would require. *Id.* at 1883. Nor is a dispute preempted by the LMRA when it tangentially involves a provision of a collective-bargaining agreement. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985).

The most recent pronouncement from the United States Supreme Court was *Lingle*, 108 S. Ct. 1877. The Court held that the employee's state law claim for retaliatory discharge was not preempted, despite the existence of a provision in the collective bargaining agreement requiring "just cause" for discharge. *Id.* at

1882. This claim was distinguished from *Lueck*, 471 U.S. 202, which involved the Wisconsin tort of bad faith in an insurance claim. *Lingle*, 108 S. Ct. at 1881. The insurance was provided through the collective-bargaining agreement, and the agreement itself established the very rights and duties which the employee was seeking to enforce. *See id.*

Another LMRA case argued extensively by the parties is *Baldracchi v. Pratt & Whitney Aircraft Div.*, 814 F.2d 102 (2d Cir. 1987), *cert. denied*, 100 L.Ed.2d 920 (1988). *Baldracchi*, like *Lingle*, dealt with a state retaliatory discharge claim. The significant holding of *Baldracchi* is that interpretation of the collective-bargaining agreement to determine the employee's damages (rate of pay, economic benefits, etc.) was tangential and did not constitute "substantial dependence" on the agreement. *Id.* at 106. This holding was approved by the Supreme Court in *Lingle*, 108 S. Ct. at 1885 n.12.

## PREEMPTION AND THE UFCA

IAM has alleged violations of three different provisions of the UFCA: (1) sec. 242.04, Stats., regarding insolvency; (2) sec. 242.05, Stats., regarding undercapitalization; and (3) sec. 242.07, Stats., regarding fraud in fact. The parties agree that IAM must establish its status as a creditor of the companies to bring a claim under the UFCA. "Creditor" is defined in sec. 242.01(3), Stats., as follows:

> "Creditor" is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

IAM specifically alleged that the employees were creditors under the terms of the collective bargaining agreement. Subsequent to the alleged repudiation of the agreement, IAM bases the creditor status on the fact of employment, i.e., the employees come to work on Monday and get paid on Friday.

IAM's position is that the UFCA establishes state rights which are independent of the collective bargaining agreement and thus not preempted. *See Lueck*, 471 U.S. at 212-13. Furthermore, once creditor status is proven, IAM argues that no further examination of the collective bargaining agreement need take place. Emphasis will shift instead to the transaction documents because IAM will not have to prove the specific amount of the debt owed to the employee to prove insolvency or undercapitalization. IAM also contends that should proof of the debt under the collective bargaining agreement be necessary, the interpretation would be tangential as it was in *Baldracchi*.

The companies' position is that IAM is seeking to enforce rights which spring from the collective bargaining agreement. In support, they cite to various out-of-state cases which characterize the UFCA as establishing only remedies but no substantive rights. *See, e.g., Clark v. Rossow*, 657 P.2d 903, 904 (Ariz. App. Ct. 1982). The companies also urge preemption because without the collective bargaining agreement, no creditor status can be proven.

Our research has found only one case dealing with a fraudulent conveyance claim and preemption under the LMRA. In *Brown v. Keystone Consol. Indus.*, 680 F. Supp. 1212 (N.D. Ill. 1988), the district court dismissed the employees' fraudulent conveyance claim because they were preexisting creditors only by virtue of the collective bargaining agreement. *Id.* at 1219. No significant analysis was done by the court, nor has the case been appealed to the Seventh Circuit because other claims are still pending in the district court. *See id.*

As regards the motion for relief from judgment, IAM argues that the renunciation of the collective bargaining agreement invalidates the trial court's basis for preemption—the necessity of using the agreement to establish creditor status. The companies contend that the renunciation and timing of the financing was

previously known to IAM. The trial court did not specifically make a finding on IAM's knowledge, basing its decision instead on its opinion that preemption would still occur even with this "new" evidence.

## CONCLUSION

Leveraged buyouts are becoming more common, as is the use of the UFCA to prevent such buyouts. *See, e.g., United States v. Tabor Court Realty Corp.*, 803 F.2d 1288, 1297 (3d Cir. 1986), *cert. denied sub nom. McClellan Realty Co. v. United States*, 107 S. Ct. 3229 (1987). The use of the UFCA by unions and employees has appeared only once in a published decision, and the viability of such claims has not yet been decided by any appellate court.

This case presents a potential conflict between federal labor law and state policy as expressed by the legislature. The decision will have statewide, as well as nationwide, impact on mergers and acquisitions.

As this appeal goes beyond our function as an error-correcting court, it is more appropriately decided by the supreme court, whose function is to declare the law and public policy of the state. *See State v. Mosley*, 102 Wis.2d 636, 665-66, 307 N.W.2d 200, 216-17 (1981). We therefore respectfully certify the appeal in this case to the Wisconsin Supreme Court pursuant to Rule 809.61, Stats.

| STATE OF WISCONSIN : | CIRCUIT COURT BRANCH 2 | : RACINE COUNTY |
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INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ("IAM"); IAM LOCAL 437, IAM LOCAL DISTRICT 172, individually and as authorized representatives of all IAM EMPLOYEES OF UNITED STATES CAN COMPANY, CONTINENTAL CAN CO., CCC SERIES 200, INC., INTER-AMERICAN PACKAGING, INC., and GP ACQUISITION CO., INC.,

*Plaintiffs,*

*-vs-*

UNITED STATES CAN COMPANY, a Georgia corporation, CONTINENTAL CAN COMPANY, U.S.A., INC., a Delaware corporation, CCC SERIES 200, INC., a Delaware corporation, INTER-AMERICAN PACKAGING, INC., a Pennsylvania corporation, GP ACQUISITION COMPANY, INC., a Pennsylvania corporation, and JOHN DOE'S 1-100, collectively referring to the banks and other lenders participating in the financing of the acquisition of Continental Can packaging sector by United States Can Co.,

*Defendants.*

Case No. 87-CV-1349

Proceedings held before the HONORABLE STEPHEN A. SIMANEK, Circuit Court Judge-Branch 2, Racine County, Wisconsin, on July 24, 1987.

APPEARANCES:

Stephen H. Skoller and Kurt C. Kobelt, Attorneys at Law, appearing on behalf of the Plaintiffs.

Robert Christensen, Susan Maisa and Deborah Patel, Attorneys at Law, appearing on behalf of Defendant, Continental Can Company, U.S.A., Inc.

Emily Mueller, Carson P. Veach and Rody Biggert, Attorneys at Law, appearing on behalf of Defendant, United States Can Company, CCC Series 200, Inc., Inter-American Packaging Inc., GP Acquisition Company, Inc.

THE COURT: As I indicated earlier, the Court has had the opportunity to review the briefs both in support and opposition to the motion brought by the Defendants under Section 802.06(3) for judgment on the pleadings, presumably either for failure to state a claim upon which relief can be granted or a lack of subject matter jurisdiction by this Court over this dispute because of the preemption contained in the federal labor laws, specifically Section 301 of the Labor Management Relations Act. I have also now had the opportunity to hear oral argument presented on behalf of both the moving party and the party in opposition to the motion, and I must make a determination under the statute whether or not judgment on the pleadings should be granted. In order to do that, the Court must accept the allegations contained in the complaint, the pleadings in dispute here as factually proven and then determine whether or not based on those pleadings as a matter of law the Plaintiff could prevail. We could go back with respect to the theories and doctrines of the federal labor law and the preemption doctrine back to the Garmon and San Diego Building Trades case and subsequent cases to learn that one of the cornerstones of the federal labor law is the attempt through legislation to create—through federal legislation to create a uniformity in dealing with disputes between employers and employees and that frequently that striving for uniformity causes along the way some inequities. Those inequities are lived with because

of the overriding benefits of the uniformity. The Defendants in this case have come to this Court asking this Court to dismiss the Plaintiffs' cause of action because this Court has no jurisdiction over a dispute which the Defendants feel is preempted by Section 301 of the Labor Management Relations Act. The basis for that motion is that the Plaintiffs' claim here is a claim based upon the collective bargaining agreement for which they seek redress through the Uniform Fraudulent Conveyance Act, Chapter 242 of the Wisconsin Statutes. The Plaintiffs claim in opposition to that motion to dismiss that this state action is not preempted because they need not rely on rights created under the collective bargaining agreement to pursue a remedy provided to creditors under Chapter 242 and that in order to be preempted the Defendants here must show that their claim is inextricably intertwined with the rights created under the collective bargaining agreement in order for the preemption to be triggered. As I indicated, I heard the—I read the briefs and I have heard the arguments. It is often difficult to articulate a cogent decision from the bench, but I will try to be as articulate as I can be in rendering the decision. I believe that the Defendants, here the moving parties, have met their burden under 802.06(3) and have demonstrated to the Court that they should be granted judgment on the pleadings. I say that because I accept the argument offered by the Defendants that this is an action which is grounded upon and entirely based upon rights created in the collective bargaining agreement. The attempt to obtain a remedy for an alleged violation or potential violation of those rights created under the collective bargaining agreement through the auspices of the Uniform Fraudulent Conveyance Act, Chapter 242, does not take the underlying claim out of the arena which is preempted by the federal labor laws. The claim remains the same, rights guaranteed to the employees through their collective bargaining agreement, whether it be pension rights, wage rights, health insurance benefit rights or whatever other rights are guaranteed under that collective bargaining agreement are the type of basis for a claim which the

federal labor laws tell the state courts keep your hands off and these disputes must be resolved in a uniform manner. I am satisfied that whether we call the issue one of status to bring the action under the Uniform Fraudulent Conveyance Act or whether we call it endorsement of a claim or utilization of a remedy or whatever we call it, it is undeniable that the basis for being in court is an agreement reached between the employees and the employers to provide certain benefits to the employees and that to guarantee compliance with those contractual obligations. This matter was brought under the auspices of Chapter 242. It does not change the nature of the animal. The animal is still protection of rights guaranteed by the collective bargaining agreement. The claim itself for which 242 gives a remedy is a claim entirely founded on a collective bargaining agreement. Plaintiffs in this lawsuit could not be creditors, but for the underlying rights negotiated by the Union with the employers in the collective bargaining agreement. Their status then as a creditor under Chapter 242 is completely derived from negotiated rights contained or negotiated benefits contained in the collective bargaining agreement. Under these circumstances I believe in applying the rationale contained in the cases cited will require this Court to accept the federal dictate—the federal law dictate that a state court cannot step in and interpret and decide this case in this forum. I am satisfied that the underlying right derives from the collective bargaining agreement and a resolution of the dispute under 242 will require this Court to evaluate and interpret a collective bargaining agreement. It is clear that I do not have the authority to do so based on the preemption doctrine as it is set forth in the statute and as it is interpreted by the cases cited. The claim is founded directly on rights created by the collective bargaining agreement, and that language found in the *Caterpillar* case, the recent Supreme Court case decided June 9, 1987, tells this Court that I do not have jurisdiction over this dispute. I am concerned every time you read in the paper or hear in the financial news of a restructuring or an LBO, you cannot escape the realization that that

buy-out or restructuring is to make the remaining corporation what the commentators like to call a lean and mean competitor. To accomplish that, the ax falls often times first on the employees by reduction in work force. I am not unaware of the jeopardy in which the Plaintiffs here are placed or at least a potential jeopardy, but the forum in which to exercise and protect those rights created under the collective bargaining agreement is not under Chapter 242 in the State of Wisconsin, Circuit Court Branch 2 for Racine County. The federal law has said the forum lies elsewhere. Therefore, the Court will grant the motion of all named Defendants who have joined the motion to dismiss. I will grant that motion under 802.06(3). I suppose I could cite the string of cases here on the record in the decision for the basis for this decision; however, I think they have been discussed to a great extent here, and in relying upon *Caterpillar,* relying upon *Gibson* and relying upon *Lueck,* I believe the Defendants, here the moving parties, have met their burden. Motion granted.

STATE OF WISCONSIN : CIRCUIT COURT : RACINE COUNTY

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ("IAM"); IAM LOCAL 437, IAM LOCAL 710, IAM DISTRICT 10, IAM DISTRICT 172, individually and as authorized representatives of all IAM EMPLOYEES OF UNITED STATES CAN COMPANY, CONTINENTAL CAN CO., CCC SERIES 200, INC., INTER-AMERICAN PACKAGING, INC., and GP ACQUISITION CO., INC.,

*Plaintiffs,*

*v.*

UNITED STATES CAN COMPANY, a Georgia corporation, CONTINENTAL CAN COMPANY, U.S.A., INC., a Delaware corporation, CCC SERIES 200, INC., a Delaware corporation, INTER-AMERICAN PACKAGING, INC., a Pennsylvania corporation, GP ACQUISITION COMPANY, INC., a Pennsylvania corporation, and JOHN DOE's 1-100, collectively referring to the banks and other lenders participating in the financing of the acquisition of Continental Can packaging sector by United States Can Co.,

*Defendants.*

Case No. 87-CV-1349

## ORDER FOR JUDGMENT

The motion of defendants Continental Can Company USA, Inc., United States Can Company, CCC Series 200, Inc., Inter-American Packaging, Inc. and GP Acquisition Company, Inc. to dismiss the above-encaptioned action on the ground that it is preempted by sec. 301 of the Labor Management Relations Act, 29 U.S.C. § 185, having come on for hearing before the Court, Stephen A. Simanek, presiding, at 1:00 in the afternoon of the 24th day of July, 1987; defendant Continental Can Company USA, Inc. appearing by Robert A. Christensen and Susan R. Maisa, defendants United States Can Company, CCC Series 200, Inc., Inter-American Packaging, Inc. and GP Acquisition Company, Inc. appearing by Carson P. Veach, Rody P. Biggert and Emily S. Miller; and plaintiff having appeared by Stephen H. Skoller and Kurt Kobelt; and the Court having considered the briefs of counsel, having heard the oral argument of counsel and being fully advised in the premises;

IT IS HEREBY ORDERED That judgment be entered dismissing the above-encaptioned action without costs to any party as against any other party.

BY THE COURT:

/s/ STEPHEN A. SIMANEK

Stephen A. Simanek
Circuit Judge—Branch 2

STATE OF WISCONSIN : CIRCUIT COURT : RACINE COUNTY

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ("IAM"); IAM LOCAL 437, IAM LOCAL 710, IAM DISTRICT 10, IAM DISTRICT 172, individually and as authorized representatives of all IAM EMPLOYEES OF UNITED STATES CAN COMPANY, CONTINENTAL CAN CO., CCC SERIES 200, INC., INTER-AMERICAN PACKAGING, INC., and GP ACQUISITION CO., INC.,

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*Defendants.*

**JUDGMENT**

Upon the order of the Court dated 8-10-87, directing judgment dismissing the complaint,

On motion of the attorneys for United States Can Company, Continental Can Company USA, Inc., CCC Series 200, Inc., Inter-American Packaging, Inc., and GP Acquisition Company, Inc.,

IT IS HEREBY ADJUDGED that the complaint of the plaintiffs in the above-encaptioned action be, and hereby is, DISMISSED and that no party shall recover costs against any other party.

Entered this 10th day of August, 1987.

BY THE COURT:

/s/ YVONNE T. JONES

Lawrence E. Flynn
Clerk of the Circuit Court